

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>VICKI M. HARVEY</b>	)	
Claimant	)	
VS.	)	
	)	Docket No. 187,637
<b>HERTZLER CLINIC, P.A.</b>	)	
Respondent	)	
AND	)	
	)	
<b>EQUITY MUTUAL INSURANCE COMPANY</b>	)	
Insurance Carrier	)	
AND	)	
	)	
<b>WORKERS COMPENSATION FUND</b>	)	

**ORDER**

Both claimant and respondent requested review of the Award dated April 21, 1997, entered by Administrative Law Judge Bruce E. Moore. The Appeals Board heard oral argument on September 12, 1997, in Wichita, Kansas.

**APPEARANCES**

Robert R. Lee of Wichita, Kansas, appeared for the claimant. Stephen J. Jones of Wichita, Kansas, appeared for the respondent and its insurance carrier. M. John Carpenter of Great Bend, Kansas, appeared for the Workers Compensation Fund.

**RECORD AND STIPULATIONS**

The record considered by the Appeals Board and the parties' stipulations are listed in the Award.

**ISSUES**

The Administrative Law Judge found claimant was unable to engage in any substantial, gainful employment and awarded claimant permanent total disability benefits. The Administrative Law Judge denied claimant's request for either reimbursement or payment of a whirlpool, adjustable bed, and mileage for trips to procure prescription medications from Gessler pharmacy in Wichita, Kansas, as those items did not constitute reasonably necessary medical expense. Respondent and its insurance carrier requested review of the issues of nature and extent of claimant's disability and the liability of the Workers Compensation Fund. Claimant requested review of the issue of medical expense payment.

The issues before the Appeals Board on this review are:

- (1) What is the nature and extent of claimant's disability?
- (2) Is claimant entitled to either reimbursement or payment for a whirlpool, adjustable bed, and mileage to and from Wichita to procure prescription medications?
- (3) What is the liability of the Workers Compensation Fund?

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After reviewing the entire record, the Appeals Board finds as follows:

The Award should be modified.

#### **(1) What is the nature and extent of claimant's disability?**

The Appeals Board agrees with the Administrative Law Judge's finding that claimant is permanently and totally disabled from engaging in any substantial or gainful employment within the meaning of K.S.A. 44-510c as a result of her back injury which the parties stipulated occurred from July 9, 1991, through March 9, 1994.

The Appeals Board finds claimant has undergone two failed back surgeries and continues to experience severe debilitating pain for which she takes narcotic medications. The Appeals Board also finds claimant's treating physician, board-certified orthopedic surgeon, Ronald R. Reschly, M.D., accurately described claimant's physical capabilities when he testified claimant could not be up more than one or two hours without having a significant increase in pain and indicated claimant could perform only those jobs where she had the opportunity to lay down for an hour after working for one-half to one hour.

In concluding that claimant is permanently and totally disabled, the Appeals Board has considered the entire record, including the testimony of Philip R. Mills, M.D., and respondent's vocational rehabilitation expert, Karen Crist Terrill.

**(2) Is claimant entitled to either reimbursement or payment for a whirlpool, adjustable bed, and mileage to and from Wichita to procure prescription medications?**

The Appeals Board finds claimant is entitled to a whirlpool to be provided by the respondent.

K.S.A. 44-510 provides as follows:

(a) It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, and apparatus, and transportation . . . as may be reasonably necessary to cure **and relieve** the employee from the effects of the injury. (Emphasis added.)

Dr. Reschly testified he believed the whirlpool would help relieve claimant's pain and may enable her to decrease her medication. As such, the doctor testified he believed the whirlpool was medically necessary. Dr. Reschly's opinion regarding the whirlpool is uncontroverted. Based upon that testimony, the Appeals Board finds the whirlpool is reasonably necessary to cure and relieve the effects of claimant's injury and claimant is, therefore, entitled to the device under K.S.A. 44-510.

Claimant contends the Appeals Board should approve an adjustable bed which Dr. Reschly has prescribed. The Appeals Board finds that claimant has failed to prove the bed is medically necessary to cure or relieve the effects of claimant's injury. Although the doctor believes the bed might benefit claimant to some extent, he was unable to testify that it was medically necessary. Because claimant has failed to satisfy her burden of proof in that regard, the request for the bed must be denied.

Claimant also requests reimbursement for the mileage driven to and from Wichita to obtain prescription medications. Respondent contends the mileage expense to Wichita was unnecessary and, therefore, should be denied because claimant should have obtained her medications from the respondent. Because respondent's pharmacy staff were claimant's co-employees and claimant had legitimate privacy concerns, the Appeals Board finds Dr. Reschly's instructions to purchase medications somewhere other than from respondent were reasonable.

The Appeals Board finds claimant chose to procure her prescription medications at Gessler pharmacy in Wichita because she formerly worked there. Although respondent operated the only pharmacy in Halstead, the record is silent whether or not there were other pharmacies located closer to claimant's home than Wichita where she could have obtained her medications. Therefore, the Appeals Board finds claimant has failed to prove her drive to Wichita was necessary. However, the record does indicate the round trip distance between claimant's home in Bentley, Kansas, and respondent's pharmacy is 20 miles.

Therefore, claimant is entitled to mileage reimbursement for 20 miles for each trip she made to fill prescriptions at Gessler pharmacy as that is the distance she would have been required to drive to and from her home to respondent's pharmacy in Halstead if she had obtained her prescriptions there.

**(3) What is the liability of the Workers Compensation Fund?**

The Administrative Law Judge found that claimant's back worsened as a natural and probable consequence of her initial injury. Respondent and its insurance carrier disagree with the Administrative Law Judge's finding. They contend claimant sustained a new and distinct work-related accident in March 1994 which caused claimant to seek additional medical treatment and be taken off work. In the alternative, they contend claimant sustained a second accidental injury during the period of June 1993 through March 8, 1994, when claimant worked for respondent after recovering from her first back surgery.

The Appeals Board agrees with the Administrative Law Judge's analysis and conclusion that claimant's back deteriorated as a natural result and consequence of her initial back injury and surgery. Claimant initially injured her back on July 9, 1991, when she was lifting a box of IV fluids over her head. After a lengthy period of conservative treatment, in April 1993 claimant underwent a two-level discectomy at the L2-3 and L4-5 intervertebral spaces. After her surgery, claimant returned to work for respondent with a 10-pound lifting restriction on a part-time basis in June 1993 and by September 1993 was working full time and attending physical therapy.

After returning to work, claimant's symptoms progressively worsened until she was unable to continue working. On March 8, 1994, Dr. Reschly again took claimant off work because of her worsening back symptoms. Despite being off work, claimant's back condition continued to worsen and she ultimately underwent her second back operation, a two-level fusion, in October 1995.

The Appeals Board finds respondent has not proven claimant sustained a second accident upon which Fund liability could be premised as required by K.S.A. 44-567. Instead, the Appeals Board finds it is more probably true than not true that claimant's back worsened as the natural result and consequence of her initial accident rather than the result of a second work-related accident. That conclusion is based upon claimant's testimony that her back progressively worsened after her first surgery despite her attempts to protect it. According to claimant, all physical activity aggravated her back, including walking and sitting, whether she was on or off work. Respondent accommodated claimant's lifting restrictions and also attempted to provide work where claimant could alternate between sitting and standing. The Appeals Board finds Dr. Reschly's testimony that claimant's work probably aggravated her back does not rise to the level of proof of additional permanent impairment or permanent injury. Indeed, Dr. Reschly's testimony is somewhat questionable in that regard as he seems to remember an incident in March 1994 which allegedly increased claimant's pain. However, he failed to note such an incident in his medical

records and claimant unequivocally testified such an incident did not occur. The evidence proves claimant had difficulty performing her job as a pharmacy technician.

When considering the entire record, the Workers Compensation Fund has no liability in this proceeding.

The Appeals Board hereby adopts as its own the findings and conclusions as set forth by the Administrative Law Judge to the extent those findings and conclusions are not inconsistent with the above.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award dated April 21, 1997, entered by Administrative Law Judge Bruce E. Moore should be, and hereby is, modified to award claimant the whirlpool prescribed by Dr. Reschly and the limited medical mileage reimbursement as provided above. Respondent and its insurance carrier are hereby ordered to provide same to claimant. In all other respects, the Award is affirmed.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of October 1997.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Robert R. Lee, Wichita, KS  
Stephen J. Jones, Wichita, KS  
M. John Carpenter, Great Bend, KS  
Bruce E. Moore, Administrative Law Judge  
Philip S. Harness, Director